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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

PROGRESSIVE CASUALTY
INSURANCE COMPANY,

Plaintiff,

v.

JACKIE K. DELANEY; LARRY E.
CARTER; MARK A. STOUT;
KENNETH TEMPLETON; JOHN

) Case No. 2:11-cv-00678-LRH-PAL

)
) **FEDERAL DEPOSIT**
) **INSURANCE CORPORATION**
) **AS RECEIVER FOR SUN WEST**
) **BANK'S MOTION TO COMPEL**
) **PROGRESSIVE CASUALTY**
) **INSURANCE COMPANY'S**
) **TIMELY PRODUCTION OF**
) **DOCUMENTS**

1 SHIVELY; STEPHEN C. KALB;)
 2 JEROME F. SNYDER; HUGH)
 3 TEMPLETON; and RICK)
 4 DRESCHLER,)
 Defendants.)

5
 6 Pursuant to Fed. R. Civ. P. 37 and LR 26-7, the Federal Deposit
 7 Insurance Corporation as Receiver for Sun West Bank ("FDIC-R") moves
 8 the Court for an order compelling Progressive Casualty Insurance
 9 Company ("Progressive") timely to complete its production of documents.
 10 Although FDIC-R served its discovery requests on Progressive on June 14,
 11 2013, FDIC-R has yet to receive the vast majority of Progressive's
 12 production and has not yet received any of the documents that Progressive
 13 agreed to produce pursuant to the ESI protocol entered by the Court in this
 14 case on October 24, 2013. *See* Order (#67). At the same time, Discovery is
 15 scheduled to close on March 14, 2014.

16 Because less than three months remain in discovery, FDIC-R
 17 respectfully requests the Court grant its Motion to Compel and enter an
 18 order (1) compelling Progressive to commence its production of responsive
 19 ESI immediately, (2) compelling Progressive to complete its production of
 20 documents no later than January 24, 2014, and (3) granting FDIC-R any
 21 further relief as the Court deems just and proper. FDIC-R has attempted to
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1 resolve this dispute without the Court's intervention. Its efforts are
2 detailed in the Declaration of Joseph Saka that is attached as Exhibit A.

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POINTS AND AUTHORITIES

I. INTRODUCTION

Although FDIC-R served its discovery requests on Progressive on June 14, 2013, FDIC-R has yet to receive the vast majority of Progressive's production and has not yet received any of the documents that Progressive agreed to produce pursuant to the ESI protocol entered by the Court in this case on October 24, 2013. *See* Order (#67). At the same time, Discovery is scheduled to close on March 14, 2014. With less than three months remaining in discovery, FDIC-R seeks an order compelling Progressive to commence rolling productions of all responsive documents immediately, and to complete its production on or before January 24, 2014.

II. FACTUAL BACKGROUND

On April 29, 2011, Progressive filed this action against the former directors and officers of Sun West Bank (the "Ds&Os") seeking a declaratory judgment that Progressive has no duty to pay defense costs or indemnify the Ds&Os in connection with FDIC-R's claims. FDIC-R subsequently intervened. FDIC-R's answer denies that Progressive is entitled to the requested relief and asserts numerous affirmative defenses, including that Progressive's representations about the scope of coverage in their marketing materials, in regulatory filings, to the purchasers of the Policy, or in the market place contradict the positions Progressive has asserted in this lawsuit. Answer (#30).

Earlier in this action and prior to any discovery, Progressive moved for summary judgment (#20). In its response (#32), FDIC-R argued, among other things, that summary judgment was premature based on the undeveloped and incomplete record. The Court agreed. In denying Progressive's motion, the Court ruled that the motion was "premature as discovery in this matter ha[d] not yet begun" and that the Court could not

1 "determine the application of certain insurance provisions in Progressive's
2 motion solely on the extremely limited record currently before the court."
3 Order (#44) at 3.

4 After the Court denied summary judgment, the case was stayed
5 until May 2013.¹ After the stay ended, the parties agreed to and the court
6 entered a new scheduling order for this case, which called for a nine-month
7 discovery period to be completed by March 14, 2014. Sched. Order (#61).
8 On June 14, 2013, FDIC-R served its first set of requests for production of
9 documents, its first set of interrogatories, and its first set of requests for
10 admission on Progressive. See FDIC-R's Mot. to Compel, (#68-1), Ex. A.

11 On October 22, 2013, the parties also reached an agreement
12 (#65) to facilitate and govern the production of ESI in this case. In that
13 agreement, which was entered by the Court on October 24, 2013,
14 Progressive agreed that it would begin producing documents as soon as
15 practicable after the executive of the Protocol. Specifically, Progressive
16 represented that "it is in possession, custody, or control of the following
17 categories of ESI: (1) Email; (2) General Documents; (3) Website
18 Documents; and (4) Progress Documents." *Id.* at 6. Progressive agreed to
19 produce Progressive Documents and Website Documents as soon as
20 practicable. *Id.* at 10-11. With respect to Email and "General Documents,"
21 Progressive agreed to "produce documents on a rolling basis and [to]
22 produce documents as soon as practicable after the Parties have agreed
23 upon search terms or established search terms with the assistance of the
24 Court." *Id.* at 8-9.

25 Unfortunately, however, FDIC-R has not to date received any
26 of the agreed-upon ESI. In fact, Progressive did not produce *any*

27 ¹ The Court granted the parties' Joint Stipulation and Order to Stay
28 Proceedings on October 19, 2012 (#48). The stay was lifted on May 1, 2013.

1 responsive documents to FDIC-R until December 16, 2013, nearly six
2 months after FDIC-R served its discovery requests and two months after
3 the October 22, 2013 agreement. Ex. A, Decl. of Joseph Saka ("Saka Decl."),
4 at ¶ 5. That production, which was made in response to this Court's
5 December 11, 2013 Minute Order, however, included only claims files for
6 eleven non-failed-bank matters that involve the unpaid loan carve out from
7 the definition of "Loss" in Progressive's standard policy form. *Id.*, Ex. 5.

8 FDIC-R repeatedly has requested that Progressive promptly
9 complete its production and comply with the ESI Protocol. To that end,
10 shortly after the ESI Protocol was entered, FDIC-R submitted search terms
11 to Progressive on November 12. *Id.*, Ex. 1. When Progressive did not
12 respond with results, FDIC-R repeated its requests for results on November
13 27, December 13, and December 17. *Id.*, Ex. 2. Finally, on December 17,
14 Progressive provided FDIC-R with a Consolidated Hit Report outlining the
15 number of documents Progressive's search for ESI retrieved. *Id.*, Ex. 3.
16 Progressive's response, however, did not indicate when Progressive would
17 be producing responsive documents, so FDIC-R asked (1) whether
18 Progressive would be moving forward with its production, and (2) when
19 Progressive anticipated it would complete its production. *Id.*, Ex. 4.
20 Rather than providing answers, Progressive instead indicated it would
21 provide a new proposal regarding its ESI production at a meeting in
22 January, but did not reveal when it anticipated completing its production.
23 *Id.* at ¶ 8. On December 27, 2013, counsel for FDIC-R and counsel for
24 Progressive spoke by telephone regarding FDIC-R's request for a date by
25 which Progressive would complete its production. *Id.* at ¶ 9. During that
26 teleconference, Progressive indicated again that it would make its proposal
27 regarding the production of ESI at a meeting in January, at which point
28 Progressive would discuss the guidelines, logistics, and timeline for its ESI

1 production. *Id.* Progressive's counsel, however, would not provide
 2 information as to when its production would be complete. *Id.*

3 With less than three months remaining in discovery, FDIC-R is
 4 extremely concerned that there will not be sufficient time for discovery
 5 unless FDIC-R receives Progressive's complete production immediately.
 6 This problem is compounded by the fact that Progressive has moved to
 7 block certain depositions in this case until its production is complete.²

8 III. ARGUMENT

9 Fed. R. Civ. P. 37(a)(3)(B) provides that "[a] party seeking
 10 discovery may move for an order compelling . . . production . . . if: . . . a
 11 party fails to respond that inspection will be permitted—or fails to permit
 12 inspection—as requested under Rule 34."

13 As noted above, Progressive previously committed to
 14 producing its documents as soon as practicable, and some on a rolling
 15 basis. Progressive, however, has ignored those commitments. To date,
 16 FDIC-R has not yet received any of the documents Progressive agreed to
 17 produce as part of the ESI protocol. Despite FDIC-R's requests that
 18 Progressive establish deadlines for production, FDIC-R has no assurance
 19 that Progressive will timely produce any documents absent an Order from
 20 this Court. Given that less than three months remain in discovery, FDIC-R
 21 seeks an order compelling Progressive to commence its production of
 22

23 ² FDIC-R, for instance, noticed the deposition of Patricia Williams, a Senior
 24 Account Executive at Progressive's claims agent ABA Insurance Services
 25 ("ABAIS"). Progressive filed a motion for protective order in the District of
 26 Columbia seeking to either: (1) block Ms. Williams' deposition by tying the
 27 date of the deposition to the time Progressive produces its documents; or
 28 (2) obtain an advance order precluding any future deposition of Ms.
 Williams. *See Progressive Cas. Ins. Co. v. FDIC as Receiver for Sun West Bank*,
 No. 1:13-mc-1043 (D.D.C.). The FDIC-R in the interim has moved forward
 with the depositions of several third parties.

1 responsive ESI immediately and to complete its production of documents
2 no later than January 24, 2014.

3 IV. CONCLUSION

4 For these reasons, FDIC-R respectfully requests the Court grant
5 its Motion to Compel and enter an order (1) compelling Progressive to
6 commence its production of responsive ESI immediately, (2) compelling
7 Progressive to complete its production of documents no later than January
8 24, 2014, and (3) granting FDIC-R any further relief as the Court deems just
9 and proper.

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5(b) and Section IV of District of Nevada Electronic Filing Procedures, I certify that I am an employee of MORRIS LAW GROUP, and that the following documents were served via electronic service: **FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER FOR SUN WEST BANK'S MOTION TO COMPEL PROGRESSIVE CASUALTY INSURANCE COMPANY'S TIMELY PRODUCTION OF DOCUMENTS**

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Dated this 27th day of December, 2013.

By: _____